

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing an Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109
)	
Universal Service Reform – Mobility Fund)	WT Docket No. 10-208

UNITED STATES TELECOM ASSOCIATION

PETITION FOR RECONSIDERATION AND CLARIFICATION

**REPLY COMMENTS OF
THE NATIONAL TRIBAL TELECOMMUNICATIONS ASSOCIATION**

I. INTRODUCTION AND SUMMARY

The National Tribal Telecommunications Association (NTTA) provides these reply comments regarding the United States Telecommunications Association's (USTelecom) Petition for Reconsideration and Clarification, filed on August 20, 2012 (*Petition*). The *Petition* requests the Federal Communications Commission (FCC or Commission) reconsider and/or clarify the Further Guidance on the Tribal engagement obligation provisions of the Connect America Fund.¹ Several parties provided comments, of which there was a clear distinction between those parties who supported the Petition and those who opposed it. NTTA falls within the latter group, and offers below its perspective on the arguments contained in the comments, the Petition, and on the Tribal engagement rules and *Further Guidance* in general.

NTTA's member companies are in large part 100% owned and controlled by their respective Tribal governments. NTTA's members include Cheyenne River Sioux Telephone Authority, Fort Mojave Telecommunications, Inc., Gila River Telecommunications, Inc., Hopi Telecommunications, Inc., Mescalero Apache Telecom, Inc., Native American Telecom – Crow Creek, Native American Telecom – Pine Ridge, Saddleback Communications, San Carlos Apache Telecommunications Utility, Inc., Tohono O'odham Utility Authority, and Warm Springs Telecom. NTTA's mission is to be the national advocate for telecommunications service on behalf of its member companies and to provide guidance and assistance to members who are working to provide modern telecommunications services to Tribal lands.

While several NTTA members filed initial comments², NTTA is taking the opportunity in replies to provide the Commission with a comprehensive assessment of the comments received thus far, and of the Tribal engagement rules and *Further Guidance* as a whole.

II. NTTA's OPPOSITION TO THE *PETITION*

NTTA opposes the *Petition* in total. Due to the fact that the *Petition* has much in common with USTelecom's previous petition³ in regards to the Commission's Tribal engagement rules, NTTA's

¹ Office of Native Affairs and Policy (ONAP), Wireless Telecommunications Bureau (WTB), and Wireline Competition Bureau (WCB) Issue Further Guidance on Tribal Government Engagement Obligation Provisions of the Connect America Fund, Public Notice, DA 12-1165, released July 19, 2012 (*Further Guidance*)

² See WC Docket Nos. 10-90, et al, Comments of San Carlos Apache Telecommunications Utility, Inc. (filed September 24, 2012); Comments of Mescalero Apache Telecom, Inc. (filed September 25, 2012); and Comments of Gila River Telecommunications, Inc. (filed September 26, 2012)

³ Petition for Reconsideration of The United States Telecom Association, WC Docket Nos. 10-90, et al, filed December 29, 2011 at p. 17-19 (*First Petition*)

opposition to USTelecom's *First Petition* is relevant to the issues discussed herein.⁴ While USTelecom makes new claims in regards to the *Further Guidance*, the general theme of the *First Petition* and this *Petition* are the same: rather than complying with a reasonable set of rules that establish a framework under which communication with sovereign Tribal governments can occur, and in NTTA's opinion should have already been occurring, USTelecom, and others, instead complain that the rules and *Further Guidance* are improper on largely procedural grounds.⁵ NTTA submits that not only are the Tribal engagement rules and the *Further Guidance* reasonable and properly adopted, but further that they are a necessary step in ensuring that eligible telecommunications carriers (ETCs) receiving federal universal service support for serving Tribal areas engage with sovereign Tribal governments on whose land they serve (or are supposed to serve).

The first concept to grasp, and which plainly escapes USTelecom and others who support the *Petition*, is that Tribal governments, with respect to communications services, are sovereign on Tribal lands and, as such, serve the role of regulator, legislature, judicial, and other executive branches of non-Tribal state governments.⁶ It is difficult to imagine USTelecom members refusing to engage with their state commission or local government in providing current services or in planning future broadband, voice, or other services. As the *Further Guidance* succinctly states, "[t]his obligation is related to the very essence of universal service – facilitating and supporting connectivity to and from the most remote areas of our nation inures to the benefit of all."⁷ None of the parties opposing the Tribal engagement rules and the *Further Guidance* have offered any alternative to ensure the Tribal governments are able to "set their own communications priorities and goals for the welfare of their membership."⁸

Next, neither USTelecom nor commenters supporting the *Petition* present any valid arguments against the substance of the *Further Guidance*. The *Petition* lists a number of objections under the guise that the *Further Guidance* was adopted without regard to a cost-benefit analysis⁹, including 1) the cost of preparing presentations, 2) costs of involving senior executives, and 3) marketing costs. Not only does USTelecom fail to provide any evidence as to the level of these costs, and how these unquantified (by USTelecom) costs exceed the benefits of the *Further Guidance*, they also fail to demonstrate that the

⁴ See WC Docket Nos. 10-90, et al, Opposition to Petition for Reconsideration [of] the Commission's Tribal Engagement Requirements, filed by NTTA (February 9, 2012)

⁵ *Petition* at 6 (violation of the APA), 14 (compliance with the PRA)

⁶ See e.g., Comments of Mescalero Apache Telecom, Inc. (filed September 26, 2012) at 7-8

⁷ *Further Guidance* at 2

⁸ Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes (adopted in 2000)

⁹ *Petition* at 11-13

cost categories cited are not already being incurred in relation to other areas served by USTelecom-represented ETCs. In other words, these types of costs are exactly what one would expect to incur in the normal course of business in planning, operating, and maintaining communications networks anywhere, and are not unique to doing so in Tribal areas. The only unique feature, apparently, is that USTelecom members do not already engage in these types of activities in regard to the Tribal areas they serve. Indeed, the *Further Guidance* recognizes this fact – “[b]etween certain carriers and Tribal governments, this will be an opportunity for introduction and dialog in the first instance.”¹⁰ This is exactly what the Tribal engagement rules and *Further Guidance* is attempting to rectify – the lack of dialog between ETCs and Tribal governments.

III. RESPONSE TO SPECIFIC COMMENTS

A. Comments in Opposition to the *Petition*

As stated above, several NTTA members filed initial comments on or around September 26, 2012. In addition, other parties filed comments opposing the *Petition*.¹¹ NTTA will provide a highlight of some of these arguments herein, and will expand on them as necessary.

First, Mescalero Apache Telecom, Inc. (MATI) stressed that the Tribal engagement rules and *Further Guidance* “must apply to all ETCs and CETCs currently receiving support, and to those who receive support in the future.”¹² MATI is addressing the request in the *Petition* that the “Commission should reconsider or clarify that the Tribal engagement requirements do not apply to ETCs whose support is being eliminated...”¹³ MATI is correct in stating that the Commission, in adopting the Tribal engagement rules, was addressing not only future broadband plans, but also the often unacceptable level of current basic telephone service penetration and quality in Tribal areas.¹⁴ Gila River further states that there is no need for clarification, and the rule as it stands is clear - “there is no need for the Commission to clarify a rule that is abundantly clear: the tribal engagement obligations apply to all ETCs providing or seeking to provide service.”¹⁵ Therefore, the Tribal engagement rules and *Further Guidance* must apply to any ETC receiving support to serve any Tribal area. Alexicon further elaborates on this

¹⁰ *Further Guidance* at 9

¹¹ See Comments of Alexicon and Native Public Media/National Congress of American Indians

¹² MATI Comments at 5

¹³ *Petition* at 3

¹⁴ NTTA clarifies that this statement is in relation to areas not served by Tribally-owned telecommunications companies. It is well-documented that such companies are extremely successful in bringing quality services to Tribal areas (see e.g., Gila River comments at 2)

¹⁵ Gila River comments at 3

point when it states “...USTelecom’s position would create a regulatory imbalance in that CETCs serving Tribal areas, and who will continue to receive support, would not have to comply with Tribal engagement rules, while incumbent ETCs, who also continue to receive support, would have to comply.”¹⁶

Second, Native Public Media and the National Congress of American Indians rightfully express concern about the direction this whole issue is taking.¹⁷ As noted, the *Further Guidance* expresses the hope that the Tribal “engagement process should not be approached as an adversarial undertaking.”¹⁸ NTTA shares this concern, and further hopes that once the input of the Tribal stakeholders is considered, the Commission’s finding that the Tribal engagement rules are “vitally important to the successful deployment of service” on Tribal lands¹⁹ is better understood and appreciated.

Third, San Carlos Apache Telecommunications Utility, Inc. (SCATUI) opines that the “idea of requiring formal engagement between tribal governments and communications companies providing service on tribal lands with USF support...generally makes good sense.”²⁰ As argued above, one of the faults of the *Petition* is that it does not argue about the issues discussed in the *Further Guidance* in any substantive manner. As NTTA stated above, the Tribal engagement rules and *Further Guidance* are reasonable, and simply attempt to formalize communications that should already be occurring. It is intuitive that ETCs serving Tribal areas would want to interact with a state or local authority, in the instant case the Tribal government, which plays “a vital role in identifying and serving the needs and interests of their local communities, often in remote, insular, cyclically impoverished communities with a historic lack of critical infrastructure.”²¹ In fact, one of the commenters, Alaska Communications Systems, stated “[b]efore making the substantial investment of capital necessary to launch new services or improve existing ones, it only makes sense for ACS to gain as detailed an understanding as possible of the customer’s needs and priorities.”²² NTTA agrees with these statements, and submits that the Commission, in adopting the Tribal engagement rules, and the ONAP, in developing the *Further Guidance*, is simply ensuring, through an enforceable rule, that these types of communications occur where they are not occurring today. Furthermore, the Tribal engagement rules and *Further Guidance*

¹⁶ Alexicon Comments at 4

¹⁷ NPM/NCAI Comments at 3

¹⁸ *Further Guidance* at 3

¹⁹ Docket Nos. WC 10-90, et al., Report and Order and Further Notice of Proposed Rulemaking (rel. November 18, 2011) (*ICC/USF Order*), at 637

²⁰ San Carlos Apache Telecommunication Utility, Inc. comments at 2

²¹ *Further Guidance* at 16

²² ACS comments at 4

pave the way towards a better understanding of how Tribal governments fit into the overall regulatory structure currently in place in the United States.

Finally, SCATUI raises a valid point in regards to the applicability of the Tribal engagement rules and *Further Guidance* to Tribally-owned ETCs. SCATUI states “[n]either the Tribe nor SCATUI need the FCC to direct them to discuss matters of mutual concern once a year: those matters are discussed on a regular, on-going basis.”²³ This statement applies to all of the 100% Tribally-owned ETCs, but also presents a bit of a conundrum for the Commission – in order for the Tribal engagement rules to be fair and nondiscriminatory, they need to apply to all ETCs, but, as SCATUI points out, the rules are perhaps not applicable, or *as* applicable, to 100% Tribally-owned ETCs. Furthermore, SCATUI believes the *Further Guidance* may “be seen as the FCC inadvertently but inappropriately interfering with the sovereignty of the San Carlos Apache Tribe by trying to dictate the relationship between the Tribe and its wholly-owned communications provider.”²⁴ SCATUI’s points are well-taken, and NTTA suggests the Commission consider accepting an abbreviated annual self-certification from 100% Tribally-owned ETCs demonstrating compliance with 47 CFR 54.313(a)(9) (the Tribal engagement rules). This would allow such Tribally-owned ETCs and their respective Tribal governments to determine the proper level of additional processes, if any, necessary to meet the laudable goals contained in the *Further Guidance*.

B. Comments in Support of the *Petition*

Comments in support of the *Petition* do not vary significantly, and can be classified into two main groups – administrative concerns and substantive concerns. Of the latter group, and as argued above, the concerns raised are more related to burden than any substantive discussion of the Tribal engagement rules and *Further Guidance* in and of themselves. NTTA will respond to the alleged burden arguments offered by several parties.²⁵ In addition, NTTA will again stress to all ETCs serving Tribal areas that engagement with Tribal governments is the only rational way to comply with Tribal business, licensing, and other requirements.

CTIA claims that the *Further Guidance* would impose overwhelming burdens on ETCs. Much like the *Petition* itself, no evidence is offered as to the magnitude of these costs, nor how incurring these costs would be outside the course of normal business, had this engagement, which should have been occurring, been occurring in the first place. In other words, CTIA seems to be complaining about added

²³ SCATUI Comments at 2

²⁴ *Id*

²⁵ See e.g., comments of RLEC ETCs, Blooston Rural Carriers, and CTIA

costs²⁶ associated with activities that the Commission has found many ETCs have been remiss in not undertaking. Furthermore, CTIA takes the *Petition's* rhetoric a few steps further and claims the costs are overwhelming. While CTIA does not define the use of “overwhelming” in the context of initiating a meaningful dialog with one’s customers, NTTA believes such extraordinary claims demand extraordinary evidence. Since no evidence, let alone extraordinary evidence, is provided, the Commission must ignore CTIA’s plea and find that the costs of complying with the Tribal engagement rules and *Further Guidance* are not outside the course of normal business for reasonable and rational ETCs, and are thus not “overwhelming.”²⁷

Another common claim among the commenters supporting the *Petition* is that, at most, the Tribal engagement rules and *Further Guidance* should only apply to those ETCs that will, presumably in the future, receive support from one of the “new” funding mechanisms the Commission adopted in the *ICC/USF Order*.²⁸ Some commenters raise the issue of uninhabited areas, and whether the Tribal engagement rules can be applied in instances where the ETC serves only uninhabited Tribal areas.²⁹ The issue of which ETCs should be required to comply with the Tribal engagement rules and *Further Guidance* is discussed above and in other comments filed. However, it bears repeating that in adopting the Tribal engagement rules in the first place, the Commission was addressing issues surrounding “basic telephone service” being provided today, as well as broadband services that may be provided in the future.³⁰ This being the case, it makes absolutely no sense to excuse an entire class of ETCs (competitive and wireless ETCs) from the requirements merely because their support is being phased-down over time. Since support is being phased-down for wireless ETCs, it necessarily follows that these carriers are receiving support today that is, in part, targeted for providing service in Tribal areas.

As to the issue of uninhabited areas, while on the surface it may make some sense to exclude ETCs that only serve such areas on Tribal lands from the Tribal engagement rules, there are other considerations. First, it only makes sense that ETCs, in order to ensure such uninhabited areas in fact exist, and furthermore such areas are not expected to become inhabited in the near future, engage with the Tribal governments to confirm such facts. Absent this dialog, the ETC is again ignoring the needs, requirements, and rules of a sovereign government, a result that the Commission, ONAP, and NTTA is

²⁶ NTTA notes that little evidence is presented that the costs outlined in CTIA’s comments are indeed incremental costs.

²⁷ While the other carriers making similar claims do not utilize CTIA’s rhetorical flourish, the arguments made here by NTTA apply to less drastic claims as well

²⁸ See e.g., NTCA comments at 2; Sprint comments at 1-2

²⁹ See e.g., RLEC ETCs comments at 1; Blooston Rural Carriers comments at 3-4

³⁰ *ICC/USF Order* at 636

trying to avoid. Second, and perhaps more importantly, there are other issues that may be present when an ETC has uninhabited areas in its service territory. As recognized by the Commission, rights of way and other permitting and review processes, and compliance with Tribal business and licensing requirements,³¹ are two areas in which engagement is needed between ETCs and Tribal governments. NTTA stresses that these are critical components of doing business on Tribal lands, and cannot be ignored, no matter the inhabitation status of the ETC's Tribal service area.

IV. CONCLUSION

While NTTA appreciates the concerns raised in the *Petition* and by the comments in support of the *Petition*, the fact remains that the Commission's Tribal engagement rules and the ONAP's *Further Guidance* are designed to correct a serious problem – a “deep digital divide that persists between the Native Nations of the United States and the rest of the country...”³² Furthermore, not only is the divide digital, but in many cases it includes basic telephone service as well. While there are many reasons this divide exists, the Commission correctly identified the lack of effective communication between ETCs and Tribal governments as a major contributing cause. As a result, the Tribal engagement rules provide a reasonable and rational starting point to frame communications that should be occurring, and the *Further Guidance* provides more concrete ways as to how this framework can work. However, it must be recognized that the Tribal governments, as the sole sovereign government in the Tribal areas, will have the final say in how the Tribal engagement rules work and how all stakeholders will begin the work of bridging the communications divide. NTTA recognizes this is a two-way bridge, and is hopeful, with the immediate adoption of the *Further Guidance*, that serious work can begin.

Respectfully Submitted,

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October 11, 2012

³¹ *Id.*, at 637

³² *Id.*, at 636